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No. 88-459

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

BELINDA ANDERSON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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14 pp

QUESTION PRESENTED

Whether income earned by an Indian tribe from the rental of land held in trust for the tribe by the United States is includible in the gross income of the members of the tribe to whom the income is distributed.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 845 F.2d 206. The opinion of the district court (Pet. App. 8a-18a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 25, 1988, and rehearing was denied on June 14, 1988 (Pet. App. 19a). The petition for a writ of certiorari was filed on September 12, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners [1] are members of the Paiute Tribe, a federally recognized tribe on a reservation in Las Vegas. Part of the reservation land is held in trust by the United States for the benefit of the tribe, under the Indian Reorganization Act (25 U.S.C. (& Supp. IV) 461 *et seq.*), which authorizes the United States to purchase and take title to land "in trust for the Indian tribe or individual Indian for which the land is acquired" (25 U.S.C. 465). The tribe leased a portion of this trust land to a third party, who operated a tobacco store on it. Pet. App. 3a, 9a; Pet. 6.

In 1980, the tribe distributed to each of the petitioners a portion of the accumulated rents from the lease. They reported the distributions as income on their federal income tax returns for 1980, paid taxes on the distributions, and then filed amended returns seeking a refund of the taxes on the ground that the distributions are exempt from tax. After the Commissioner denied their claims, they brought this refund suit in the United States District Court for the District of Nevada. Pet. App. 3a, 8a-11a.

2. The district court entered judgment for the government on the pleadings, ruling that the distributions must be included in petitioners' gross income for income tax purposes (Pet. App. 8a-18a). The court

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[1] Although Belinda Anderson is named as the lead plaintiff in the court of appeals (Pet. App. 1a) and in the petition (Pet. 1), the district court found that it lacked jurisdiction to consider her claim (Pet. App. 10a). The court of appeals did not discuss that finding, and the petition does not assert that it is filed on behalf of Belinda Anderson (Pet. 1). Accordingly, references to petitioners herein do not include Belinda Anderson.

explained that it is well settled that Indians are subject to payment of federal income taxes, as are other citizens, unless an express exemption can be found in a treaty or federal statute (*id.* at 11a). The court rejected petitioners' contention that such an exemption can be found for the income in question by analogy to *Squire* v. *Capoeman*, 351 U.S. 1 (1956), and *Stevens* v. *Commissioner*, 452 F.2d 741 (9th Cir. 1971), because those cases involved income derived from land held in trust for the individual tribe member as his own "allotment" under the federal statutes relating to Indians. The district court found that no such exemption is available for income generated by land, like that involved here, that the United States holds in trust for the benefit of a tribe as a whole, which is not allotted to individual tribe members (Pet. App. 11a-16a).

The court of appeals affirmed (Pet. App. 1a-7a). It agreed with the district court that *Capoeman* and *Stevens* provide an exemption only for income earned by a member of a tribe from the use of land that the United States holds in trust for him as his own allotment. The court explained that the principal rationale for the exemption is to enable an Indian to acquire his allotted land at the end of the trust period free and clear of any lien or encumbrance that might otherwise burden the land as a result of his nonpayment of taxes (*id.* at 4a-5a). The court of appeals concluded that petitioners had established neither that Congress intended to exempt their distributions, nor that their interest in the distributions "is analogous to a right to receive property free of encumbrance recognized in *Capoeman* and *Stevens*" (*id.* at 7a).

ARGUMENT

1. Petitioners do not dispute that income received by Indians, like that of other citizens, is subject to federal income taxation unless clearly exempted by statute or treaty. See *Squire* v. *Capoeman*, *supra*; *Superintendent of Five Civilized Tribes* v. *Commissioner*, 295 U.S. 418 (1935); *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 155-157 (1973). Nor do they dispute this Court's conclusion in *Choteau* v. *Burnet*, 283 U.S. 691, 696 (1931), that "[t]he intent to exclude [from income tax] must be definitely expressed, where, as here, the general language of the Act laying the tax is broad enough to include the subject matter." Instead, petitioners simply contend (Pet. 7-20) that the income distributed to them is exempt from tax under the Indian General Allotment Act (25 U.S.C. (& Supp. IV) 331 *et seq.*), as construed by this Court in *Squire* v. *Capoeman*, *supra*, and under the Indian Reorganization Act (25 U.S.C. 461 *et seq.*), as interpreted by the Ninth Circuit in *Stevens* v. *Commissioner*, *supra*. Their contentions are without merit, and were correctly rejected by the courts below. The decision of the court of appeals does not conflict with any decision of this Court or of another court of appeals, and there is no reason for further review of its judgment.[2]

Under the Indian General Allotment Act, the United States divided certain Indian reservations into uni-

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[2] Even if petitioners were correct (Pet. 7) that the judgment of the court of appeals conflicts with its decision in *Stevens*—which we dispute (see pages 5-8, *infra*)—such an intra-circuit conflict would be for the court of appeals, not this Court, to resolve. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

form parcels and held one such "allotment" in trust for each Indian allottee and his heirs. The Act provided that, at the end of the statutory trust period, the Indian allottee was to be issued a patent to his land "in fee, discharged of said trust and free of all charge or incumbrance whatsoever" (25 U.S.C. 348), and thereafter the land "shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent" (25 U.S.C. 349). In *Capoeman*, this Court construed those provisions to create a tax exemption for capital gains that an Indian received, during the trust period, from the sale of timber logged off his own allotment. The Court reasoned that the General Allotment Act guaranteed that land allotted to an Indian would eventually be delivered to him free and clear of all charges and encumbrances, thereby helping him to compete on an equal basis in the economic world. 351 U.S. at 6-10. The Court concluded that it would frustrate the policy of the Act for the government to tax its Indian ward on income derived directly from the land it held in trust for him. *Ibid.* See *Mescalero Apache Tribe*, 411 U.S. at 155-156 & n.12.

In *Stevens*, the Ninth Circuit ruled that the reasoning of *Capoeman* extends to income derived from land acquired by the government in trust for an individual Indian under the Indian Reorganization Act (see 25 U.S.C. 465). Thus, the court granted an exemption for income an Indian earned by farming and ranching land that was held in trust for him pursuant to that Act. The court explained that Congress intended to afford land set aside for an individual Indian under that Act the same protections granted by the Indian General Allotment Act (452 F.2d at 745). See 25 U.S.C. 335.

The *Capoeman* exemption has consistently been confined to income an Indian receives from the use of lands that have been held in trust for him on an individual basis. The courts have uniformly declined to interpret *Capoeman* as providing an exemption for income derived from unallotted tribal lands held in trust for the tribe as a whole.[3] The courts reason that the rationale of *Capoeman*—to guarantee that title to an allotted parcel of land will pass to the Indian allottee at the end of the trust period free and clear of all liens and encumbrances—does not extend to exempting an Indian from tax on income generated by lands held in trust for the entire tribe. Thus, the Ninth Circuit stated in *United States* v. *Anderson*, 625 F.2d 910, 914 (1980), cert. denied, 450 U.S. 920 (1981) (citation omitted):

> *Capoeman*'s point was that if an Indian's allotted land (or the income directly derived from it) was taxed, and the tax was not paid, the resulting tax lien on the land would make it impossible for him to receive the land free of "incumbrance" at the

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[3] See, *e.g.*, *Jourdain* v. *Commissioner*, 617 F.2d 507 (8th Cir.), cert. denied, 449 U.S. 839 (1980) (no exemption for tribal official's salary paid out of revenues derived from unallotted tribal lands); *Commissioner* v. *Walker*, 326 F.2d 261 (9th Cir. 1964) (same); *Fry* v. *United States*, 557 F.2d 646 (9th Cir. 1977), cert. denied, 434 U.S. 1011 (1978) (no exemption for payments to Indian logger who worked on unalloted lands of the reservation); *Holt* v. *Comissioner*, 364 F.2d 38 (8th Cir. 1966), cert. denied, 386 U.S. 931 (1967) (no exemption for profits received by Indian from ranching common tribal lands); *United States* v. *Anderson*, 625 F.2d 910 (9th Cir. 1980), cert. denied, 450 U.S. 920 (1981) (no exemption for income earned by Indian from grazing cattle on parcels of reservation land, none of which was held in trust for him).

> end of the trust period. The purpose of §§ 5 and 6 [of the Indian General Allotment Act, 25 U.S.C. 348, 349] was "to provide the allottee with unencumbered land when he became competent. It was not to benefit him simply because he was an Indian, or to benefit Indians generally."

In contrast to the facts of *Capoeman* and *Stevens*, where the Indians earned income from working their own allotments, a tax levied on income received by an Indian from activities conducted on lands not allotted to him does not create an encumbrance on tribal lands. If an Indian (or another taxpayer) fails to pay a federal tax assessed against him, a lien may arise upon his own property, for he is the "person liable to pay [the] tax" (see Section 6321 of the Internal Revenue Code (26 U.S.C.)); [4] a lien does not arise upon the property of his tribe. As the court observed in *Holt* v. *Commissioner*, 364 F.2d at 41, "[t]he taxation of the taxpayer's individual profit derived from his lease of tribal land cannot possibly represent a burden or encumbrance upon the tribe's interest in such land."

The courts below accordingly followed uniform authority in rejecting petitioners' reliance on *Capoeman* and *Stevens*. It was undisputed that the distributions of income to petitioners derived from land that the United States held in trust for their tribe which had not been allotted to any of them as individuals. Hence, as the court of appeals ruled, the statutory right protected in *Capoeman* and *Stevens*, which enables an Indian to take his own allotment free of

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[4] Petitioners do not assert that they hold any individually allotted land; it is therefore unnecessary to consider whether a failure to pay the tax involved here might result in an encumbrance on an individual allotment.

encumbrance, "is not implicated" by taxation of the profits distributed to petitioners (Pet. App. 5a). No liens would arise against the unallotted tribal land that produced those profits were petitioners to fail to pay income tax liabilities of their own. Nor has the United States guaranteed to deliver that land to petitioners free and clear of all encumbrance. Thus, the courts below correctly concluded that nothing in *Capoeman* or *Stevens*, or in the statutes they construe, affords an exemption from income tax for the income received by petitioners.[5]

2. Petitioners further contend (Pet. 20-26) that, because the rental income was not taxed to their tribe while the tribe was accumulating it, distributions of that income come from an exempt source and are not taxable to them. They argue (Pet. 21) that they are entitled to the same treatment as beneficiaries of a trust who receive distributions of tax-exempt interest: the income retains its tax-exempt character in the beneficiaries' hands. See Sections 652(b) and 662(b) of the Internal Revenue Code. The court of appeals correctly rejected that argument (Pet. App. 7a). Unlike tax-exempt interest, which is expressly shielded from tax, the rental income earned by peti-

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[5] Petitioners' reliance (Pet. 19-20) on 25 U.S.C. 564(j) and 25 U.S.C. (1970 ed.) 898 is also misplaced. Those statutes (the latter of which is now repealed) expressly exempted from federal income tax certain distributions by the Klamath and Menominee Indian tribes. They were enacted to facilitate the termination of federal supervision of those tribes. The plain inference from those statutes is that specific legislation was necessary to exempt the members of those tribes from paying income tax on distributions of tribal assets, and that, in the absence of such legislation, the payments would be subject to tax. Congress has not provided a comparable exemption for the distributions made by the tribe involved here.

tioners' tribe constitutes "gross income" within the meaning of the Internal Revenue Code. Under long-standing administrative practice, the Treasury does not seek to tax such income to the tribe itself, reasoning that the tribe is not a separate taxpaying entity. See Rev. Rul. 67-284, 1967-2 C.B. 55, 58. But this rationale does not support an exemption for taxable income received by a tribal member from his tribe. Rather, the Revenue Ruling affirms that "[t]ribal income not otherwise exempt from Federal income tax is includible in the gross income of the Indian tribal member when distributed or constructively received by him." *Id.* at 58. See *Tonasket* v. *Commissioner*, 50 T.C.M. (CCH) 489, 492 (1985) (members of tribe were taxable on their tribe's distributions of income from lease of unallotted lands).

Petitioners' argument that the distribution to them derived from an exempt source is analogous to a contention that was rejected by this Court in *Choteau* v. *Burnet*, *supra*. In that case, an Indian tribe's lease of tribal lands generated royalties that were received by the United States as a trust fund, and then distributed among the tribe's members. The Internal Revenue Service included the royalties in the gross income of the tribe members who received them, and one of them sought an exemption for the distribution to him, arguing that since the royalties were not taxable while in the government's hands, "income derived by the individual member from this fund comes from an exempt source and must therefore also be held to be exempt" (283 U.S. at 696). This Court rejected that argument, noting that "whatever may have been the liability of the fund to federal taxation while it remained in the hands of the government," the royalties fell within the Code's

definition of "gross income" and therefore were subject to tax when paid to the members of the tribe. *Id.* at 697. Similarly, although petitioners' tribe was not taxed upon receipt of the rentals in question because it is not considered to be a taxpaying entity, once the income was distributed by the tribe to petitioners, there was no basis for exempting it from tax and they must include it in their gross income. See *Commissioner* v. *Walker*, 326 F.2d at 264.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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